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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL RIVAS,

Defendant and Appellant.

A107031

(Sonoma County  
Super. Ct. No. SCR32686)

Defendant pleaded no contest to a charge of manslaughter and admitted a gun-use allegation, which arose from a failed robbery attempt, in exchange for the prosecutor's agreement to drop a capital murder charge. Defendant now argues that the imposition of the maximum sentence for both the charge and the allegation was error because the court based its sentence upon facts it found true by a preponderance of the evidence, rather than beyond a reasonable doubt. He further argues that the court's imposition of the upper term for the gun-use enhancement was not supported by substantial evidence. We find no prejudicial error and affirm the judgment.

I.  
BACKGROUND

Defendant, Rafael Rivas, was charged by information with the capital murder of Hector Montoya (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)),<sup>1</sup> with attendant

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<sup>1</sup> All section references are to the Penal Code.

allegations that the murder took place during the commission of a robbery (§ 190.2, subd. (a)(17)(A)) and/or a burglary (§ 190.2, subd. (a)(17)(G)), and that defendant personally and intentionally used a handgun causing Montoya's death (§ 12022.53, subd. (d)). After initially pleading not guilty, defendant changed his plea to no contest based upon an agreement that the prosecutor would request dismissal of the capital murder charge in return for defendant's plea to manslaughter and a lesser gun-use enhancement (§ 12022.5, subd. (a)).<sup>2</sup> The court found a factual basis for the plea to the charge and the admission of the gun-use allegation based upon evidence adduced at the preliminary hearing<sup>3</sup> and "the file" in the case.

The court based defendant's sentence in part on the probation report after defendant specifically requested that the court consider his comments to the probation officer. The court stated, "I don't have much doubt that Mr. Rivas is a human being who can make life work for him and be a productive and valued member of our society in the future. Nonetheless, I have to weigh the aggravating and mitigating circumstances<sup>4</sup> and make a decision on how to apply the laws that exist. [¶] . . . [¶] The Court then is reluctantly imposing the aggravated term of 21 years, which is eleven years on the [section] 192 count and ten years on the [section] 12022.5(a) [enhancement], for a total of 21 years." The trial court denied defendant's subsequent request for a certificate of probable cause.

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<sup>2</sup> The lesser gun-use enhancement is punishable by three, four, or ten years in state prison.

<sup>3</sup> The evidence admitted at the preliminary hearing included autopsy and pathology reports and medical records.

<sup>4</sup> The only applicable mitigating factor noted in the probation report or the appellant's brief was that defendant had no prior criminal record at the time of this offense. (Cal. Rules of Court, rule 4.423(b)(i).) Defendant was later convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) for threatening and chasing three men with a baseball bat after claiming exclusive rights to the park they were in on behalf of his gang.

## II. DISCUSSION

Defendant claims that the imposition of aggravated terms for the offense and the enhancement violated his right to a verdict and findings beyond a reasonable doubt under *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531] (*Blakely*). (See also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477 [right to proof of guilt beyond a reasonable doubt arises from the due process clause of the Fourteenth Amendment to the United States Constitution].) In *Blakely*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, or admitted by the defendant. (*Blakely, supra*, 524 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2536].) The applicability of *Blakely* to sentences arising under California law is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) Assuming that *Blakely* applies to our determinate sentencing scheme,<sup>5</sup> we conclude that *Blakely* affords no relief to defendant herein because the sentence imposed was within the range to which he was exposed by his plea and admission.

The record reflects that defendant entered his plea pursuant to a negotiated disposition with the understanding that the trial court could impose any sentence up to and including the statutory maximum. The court expressly informed defendant, and defendant confirmed his understanding, that 21 years in prison was the statutory maximum term. It stated: “I did want to tell you up front that while I want to listen to everything your lawyer has to tell me about this case, I will still regard this as a very serious case and I think it’s more likely than not you would end up getting the 21 years.

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<sup>5</sup> *United States v. Booker* (Jan. 12, 2005, Nos. 04-104 and 04-105) \_\_\_\_ U.S. \_\_\_\_ [125 S.Ct. 738] may have cast doubt on that assumption given the discretionary nature of California’s sentencing scheme. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 349 [noting that the court has broad discretion to decide whether to impose the upper or lower term].)

Do you understand that?” Defendant replied, “Yes.” The court continued, “I’m dead serious about that . . . . I don’t want you to do this with the belief it’s going to be something less than 21 years. Do you understand that?” Defendant replied, “Yes. Yes.” Defense counsel also stated, “[i]t is [defendant’s] understanding and he’s asked that I express that on the record, the triad on . . . the underlying charge, and the weapon [enhancement] is a 21 total years possible. The range however is 6 to 21 [years] depending on how the Court sentences . . . .” Defendant signed and initialed a statement that he understood that his no contest plea would be treated as a guilty plea, that he would be sentenced as if he were guilty, and that his prison sentence could be as long as 21 years. He ultimately pleaded no contest to the charge of manslaughter, admitted the gun-use allegation, and waived various trial-related rights.

Where, as here, a defendant agrees pursuant to a plea agreement that the maximum sentence may be imposed, the defendant necessarily admits that the conduct is sufficient to expose him or her to that punishment. *Blakely* does not preclude such a sentence as long as the sentence is within the range to which the defendant was exposed by his or her admissions. Such is the case here. Appellant in effect admitted the existence of facts necessary to impose the upper or aggravated term, and nothing more is required under *Blakely*.

Defendant further argues that insufficient evidence supported the imposition of the upper term for the gun-use enhancement because substantial evidence of aggravating factors did not outweigh evidence of any mitigating factors. The court shall select the middle term for a sentence enhancement unless aggravating or mitigating circumstances justify an upper or lower term. (Cal. Rules of Court, rule 4.428(b).) It must state for the record its reasons for an aggravated or mitigated sentencing choice. (§ 1170, subd. (c).) Respondent correctly argues that defendant waived review of this issue by failing to object to any deficiency in the court’s assignment of specific reasons for its sentencing choices. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1112-1113; see also Cal. Rules of Court, rule 4.412(a) [defendant’s agreement to a sentence is adequate reason to impose

that sentence].) Even ignoring defendant's waiver of this claim, his argument fails on its merits.

In its decision whether to impose an aggravated or mitigated sentence for an enhancement rather than the middle term, the court may consider a variety of circumstances enumerated in the California Rules of Court or otherwise reasonably related to the facts regarding the enhancement, the crime, or the defendant. (Cal. Rules of Court, rule 4.428; see also rules 4.408, 4.421, 4.423; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 871-872.) We must presume that the court considered the relevant sentencing criteria. (Cal. Rules of Court, rule 4.409.)

The brandishing of a firearm, with or without pointing it at a victim, is an implicit threat that may warrant an aggravated sentence. (*People v. Zamarron, supra*, 30 Cal.App.4th at p. 872; *People v. Simms* (1994) 24 Cal.App.4th 462, 469, fn. 8, superseded by statute on other grounds as stated in *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1316.) Defendant pointed the gun toward a witness, showing a particularly dangerous and menacing use of the weapon as opposed to a purely spontaneous or accidental discharge of the gun. Defendant's infliction of great bodily injury also justified the court's imposition of the upper term for the enhancement. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1776; *People v. Edwards* (1993) 13 Cal.App.4th 75, 79-80, overruled on other grounds by *People v. Hall* (1994) 8 Cal.4th 950, 964, fn. 9.) The fact that the gunshot hit the victim in the neck supports the conclusion that defendant intended to inflict a life-threatening injury. (*People v. Vorise* (1999) 72 Cal.App.4th 312, 318-319 [method or manner of killing may show premeditation].)

Circumstances about the substantive crime that the court may consider in aggravation include that the defendant occupied a position of leadership during the crime, that the victim was particularly vulnerable, or that the crime showed planning, involved great bodily harm, or an attempted taking of great monetary value. (Cal. Rules of Court, rule 4.421(a), (b).) The record amply supports the court's finding that these circumstances arose in defendant's case. "[T]he victim was in a vulnerable position, [as]

the store [was] closed [to] business late at night, and also the defendant did maintain a position of apparent dominance or leadership; . . . I also believe that the mitigating factors cited in the probation report apply, that the fundamental analysis of aggravation or mitigation involves weighing the facts and circumstances of this crime against all other crimes of this type; and the type of crime that Mr. Rivas has been convicted of is a manslaughter, and the facts . . . of this case are simply off the scale in terms of being compared to other manslaughters. If Mr. Rivas had been convicted of [other charges arising from such facts], then he would be facing life, possibly without parole, on this case.”

Further, defendant admitted that he acquired the gun and loaded it for the purpose of robbing the Azteca Market, showing that he planned to use the gun as a potentially lethal weapon. Defendant’s role in the attempted robbery showed leadership, as he entered the store first, wielded a deadly weapon, and communicated his demands to the victims. The victim died of a single gunshot wound to the neck, certainly constituting great bodily harm. Defendant knew that the market ordinarily took in a great deal of money, as much as \$10,000 to \$20,000 daily. The aggravated sentence for the gun-use enhancement was supported by substantial evidence because even a single factor in aggravation will support the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

As discussed regarding defendant’s *Blakely* argument above, defendant admitted the truth of the gun-use allegation with the potential for an aggravated sentence and did not object to the facts adduced in the probation report. (§ 1170, subd. (b);<sup>6</sup> *People v. Slater* (1989) 215 Cal.App.3d 872, 875 [defendant may present evidence to rebut probation report at sentencing].) His claim that the court’s imposition of the aggravated term for the gun-use enhancement was not supported by the evidence thus fails.

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<sup>6</sup> “[E]ither party . . . may submit a statement in aggravation or mitigation to dispute facts in the record, or the probation officer’s report or to present additional facts.”

III.  
DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Kay, P.J.

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Reardon, J.